No. 86-328

In The
Supreme Court of the United States
October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 5-376,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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Most of the parties' exchanges of arguments and authorities to this stage of the case mirror the various conflicting positions adopted by the courts of appeals. *Compare United States v. City of Twin Falls,* 806 F.2d 862, 876-78 (9th Cir. 1986) (clarifying the circuit's position favoring discretion to tax expert witness fees) *with Chicago College of Osteopathic Medicine v. George A. Fuller*

Co., 801 F.2d 908, 909-12 (7th Cir. 1986) (clarifying the circuit's position against discretion to tax expert witness fees). In reply, Champion offers three points for the Court's particular consideration.

First, in various ways and at various points in their responses, the Respondents and their supporters have contended that Rule 54(d)'s proviso somehow affects whether a particular litigation expense may be taxed as part of the prevailing party's costs. *E.g., Brief for Amici Curiae NAACP* at 11-12. This position flies in the face of a common sense reading of Rule 54(d) as well as the Court's application of the proviso in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275-284 (1946), and similar statements more recently in *Marek v. Chesny*, 105 S.Ct. 3012, 3017 (1985). Rule 54(d) establishes only that costs may not be taxed where Congress has expressly forbidden taxation; nowhere does Rule 54(d) define what is and what is not a potentially taxable litigation expense.

Second, the positions urged by Respondent IWA and the amici curiae, at least to a point, are not necessarily inconsistent with Champion's positions. That is, there is little doubt that expert witnesses are frequently of critical importance in Title VII and related civil actions. Champion therefore agrees that it is entirely consistent with the congressional policies underlying Title VII that such expenses, where necessary and appropriate, be taxed for whichever party prevails. Indeed, Champion further submits that it would be impossible to find a contrary congressional intent for most federal causes of action since Congress likely would approve of such recoveries for any party who had been able to advance or defend a federal right in large part because of expert witness assistance.

Third, Champion submits that Representative Drinan's single comment provides insufficient grounds for imputing to Congress, as the IWA insists, an intent to equate expert witness costs with attorneys' fees. *See also United States v. Oregon*, 366 U.S. 643, 648 (1961) (resort to legislative history is unnecessary when statute is clear and unequivocal on its face). Although the Court has addressed a number of statutory attorneys' fees issues, particularly recently,[1] not a single case has even intimated that attorneys' fees encompass anything significantly beyond an hourly rate. Moreover, the courts of appeals have overwhelmingly rejected arguments that litigation expenses such as expert witness fees are to be taxed as attorneys' fees. *E.g., Bennett v. Department of Navy*, 699 F.2d 1140, 1143-44 (Fed. Cir. 1983); *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983); *Northcross v. Memphis City Schools*, 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 623-24 (4th Cir. 1978).

The key to this case always has been and continues to be whether Rule 54(d) has entrusted to the federal trial courts sufficient discretion to tax as a part of the costs, in exceptional cases, the expert witness fees of the prevailing party where the trial judge finds that such testimony was necessary to the finder of fact's proper determination of the case. It has never been suggested, nor

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[1] Pennsylvania v. Delaware Valley Citizens' Council, 106 S.Ct. 3088 (1986); City of Riverside v. Rivera, 106 S.Ct. 2686 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

reasonably could such arguments be made, that federal trial judges are incapable of such decisions.

Respectfully submitted,

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Petitioner

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